

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
EASTERN WATERLOO DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

No. CR20-1012-CJW

DOUGLAS JOHN BUTTIKOFER, JR.,

TRANSCRIPT OF
STATUS CONFERENCE

Defendant.

_____/

The Status Conference held before the Honorable C.J. Williams, Judge of the United States District Court for the Northern District of Iowa, at the Federal Courthouse, 111 Seventh Avenue Southeast, Cedar Rapids, Iowa, November 24, 2020, commencing at 12:58 p.m.

APPEARANCES

For the Plaintiff: ELIZABETH DUPUICH, ESQ.
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Cedar Rapids, IA 52401

For the Defendant: MARK A. EISENBERG, ESQ.
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1 (The following transcript was prepared from an
2 audio recording.)

3 * * * *

4 THE COURT: The matter before the Court is
5 United States of America versus Douglas Buttikofer,
6 Junior, Case Number 20-CR-1012. This matter comes on for
7 a status conference scheduled at the Court's initiation.
8 This case is scheduled for trial on December 14. I saw
9 that there is an unresisted motion for an extension of
10 the deadline for acceptance that is -- that was filed
11 yesterday. And I'll bring that up in a moment or talk
12 about that in a minute.

13 But primarily what I wanted to do is figure out
14 whether this case is going to trial; if it is going to go
15 to trial, how long we think it's going to take to try the
16 case. I've got another case scheduled for the 14th
17 that's got a speedy trial issue. The clock is stopped in
18 this case. So between the two cases, I'm afraid I'd have
19 to bump this one if I needed to in order to try that one.

20 Unfortunately, that case involves an attorney that
21 is kind of new to the practice of federal criminal law,
22 and I'm not sure that it's not going to plead out, but I
23 may not know that until the last minute. And defendant
24 in that case, there's no benefit to the third level off
25 for acceptance of responsibility. So there's no motive

1 to tell us quickly that the person's going to plead
2 guilty.

3 So all that's to say I may be bumping this only to
4 find out that my week opens up and I could have tried
5 this case after all.

6 But that's what motivated this conference call today
7 is my need to make sure I can have a good schedule and
8 try what I need to try.

9 So, Mr. Eisenberg, I'm not holding you to anything,
10 but what are the chances in your mind that this case is
11 going to trial versus a plea?

12 MR. EISENBERG: Right now maybe 50/50.
13 Miss Dupuich and I have been working diligently to try to
14 get it resolved. And, in fact, she got Mr. Cole involved
15 yesterday. And I'm trying, but -- so I will say 50/50.
16 It's difficult for me, Judge, to do anything in this case
17 because the only way I can do it is a phone call to the
18 client because I can't go down and see him and spend a
19 lot of quality time with him because of their jail
20 being -- not letting anybody in the jail.

21 But I could do it on the 14th if we have to. But I
22 also need to know my -- let my experts know. I have one
23 that's -- they both have it pencilled in. It's just if
24 we're going to get bumped, I'd like to let them free up
25 some time.

1 THE COURT: Certainly. Yeah. No. And I know
2 that that's -- any time I'm bumping a case it causes all
3 kinds of ripple effect problems.

4 Well, let's talk about --

5 MR. EISENBERG: I would also --

6 THE COURT: I'm sorry. Go ahead.

7 MR. EISENBERG: I would also -- I'm sorry. I
8 didn't mean to interrupt you. Go ahead.

9 THE COURT: No, no. You go ahead,
10 Mr. Eisenberg.

11 MR. EISENBERG: Well, I'm 65 years old, and I'm
12 not jumping up and down to spend all this time in that
13 kind of setting. I will do it if you feel it's
14 necessary. I will do it. I would, of course, rather
15 wait till COVID's over, and we have not filed any request
16 for speedy trial. But -- so I'm at your mercy on that.
17 But I will do it, but I'm not really crazy about it.

18 THE COURT: Well, Mr. Eisenberg, I guess in --
19 the way that we're doing things here is -- and the
20 position I've taken and the chief has taken -- excuse me.
21 Excuse me. I just had to sneeze. The position the chief
22 judge and I have taken on this is that any defendant who
23 wants to go to trial, who -- particularly any defendant
24 who's in custody particularly who says I want to have my
25 trial, we believe we owe it to that person to try to have

1 a trial for them because they have a constitutional right
2 to a trial and they're in custody, and I think it's a
3 miscarriage of justice if we don't try to try a case even
4 in the midst of a pandemic.

5 On the other hand, any defendant who moves for a
6 continuance and would request a continuance because of
7 COVID-19, it's been our position that we will readily
8 grant those.

9 MR. EISENBERG: Okay.

10 THE COURT: Particularly during this time where
11 we have a spike in the -- in the outcome.

12 I did deny one motion for a continuance, but this
13 was back in June or something like that. The numbers
14 were really low in Linn County, and that case had been
15 continued something like four or five times already. And
16 it looked to me like this was just the latest excuse the
17 defense attorney had for wanting to kick the can down the
18 road. So I did deny one motion to continue a trial in
19 that case. And it ended up pleading almost immediately
20 afterwards.

21 But with that one exception, my position's been that
22 if a defense -- if a defendant wants to continue the
23 trial and files a motion absent other extraordinary
24 circumstances, I'm going to grant that motion and push it
25 down the road a little bit.

1 So you can have that conversation with your client,
2 and if your client would prefer to continue the trial,
3 then you can file a motion to continue. Talk with
4 Miss Dupuich and find out her position on it. Then you
5 can represent that in the motion, and then we can kind of
6 go from there.

7 MR. EISENBERG: I will let you know that by
8 Friday. Thank you. I appreciate that information.

9 THE COURT: Very good. Let's talk briefly
10 about this motion for extension of the deadline.

11 Miss Dupuich, I understand you don't have an
12 objection to the extension?

13 MS. DUPUICH: That's correct, Your Honor.

14 THE COURT: All right. We will grant that
15 motion then and extend the deadline for the third level
16 off for acceptance when the government's not objecting to
17 it.

18 Let's assume this case is going to trial whether
19 it's on the 14th or whether it's on some other date. It
20 may be helpful for us just to have a conversation here.
21 Miss Dupuich, how long do you think the government's case
22 is going to take?

23 MS. DUPUICH: Thank you, Your Honor.
24 Approximately three days.

25 THE COURT: And that -- is that inclusive of

1 jury selection and closing arguments, or that's just your
2 case in chief?

3 MS. DUPUICH: That would be inclusive of jury
4 selection and closing argument. We have approximately
5 four case-in-chief witnesses. There's a possibility we
6 may be asking for 404(b). That hasn't yet been decided.
7 If we did file a motion for 404(b) evidence and it was
8 granted, that would lead to approximately an additional
9 one, possibly two witnesses.

10 THE COURT: Would this be 404(b), or would it
11 be 413, 414, 415 evidence?

12 MS. DUPUICH: As of now -- thank you, Your
13 Honor. As of now, we're considering it as 404(b), but
14 that would be a motion that we would file by this Friday.

15 THE COURT: Yeah. Okay. Interesting. Any
16 other unusual evidentiary issues that would be helpful
17 for me for scheduling purposes to know about?

18 MS. DUPUICH: Nothing else. We have a couple
19 of witnesses flying in from Washington, D.C., and then
20 just anticipated argument would be the entrapment
21 defense. But I can't think of anything else.

22 THE COURT: All right. And I take it in this
23 case you don't have any in-custody witnesses; is that
24 correct?

25 MS. DUPUICH: That's correct. They're all --

1 they're all law enforcement aside from possible 404(b)
2 which may be law enforcement too.

3 THE COURT: Okay. And then, as you know, a
4 magistrate judge can preside over jury selection in our
5 district upon consent of both parties. Would the
6 government consent to a magistrate judge presiding over
7 jury selection?

8 MS. DUPUICH: Yes, Your Honor.

9 THE COURT: All right. All right. Thank you.
10 Mr. Eisenberg, what's your best estimate of how long
11 this trial's going to take?

12 MR. EISENBERG: I think if the 404(b) evidence
13 comes in, it's going to add at least a day. I had
14 drafted my trial motions. I thought they were due
15 yesterday. But after talking to Miss Dupuich, they
16 aren't due till Friday. But one of them -- one of my
17 motions in limine includes this 404(b) evidence and
18 trying to explain to you why I don't think it should come
19 in.

20 So that's going to -- if it does come in, that's
21 going to add at least a day because there are a lot of
22 tape recordings that are going to -- that are going to be
23 exculpatory for me to play, and I'm going to need to play
24 those so that -- and, of course, I would -- what's the
25 word I'm looking for? I would excise the parts that

1 aren't relevant, and then I have transcripts of them, and
2 I shared that with Miss Dupuich already. But I think
3 that would add some significant time to the trial.

4 THE COURT: Okay. And, again, I'm not holding
5 you to an exact number or anything like that, and you
6 don't have to mention your defendant -- your client
7 because the defendant can always choose to testify. But
8 do you anticipate calling, other than your expert, any
9 other witnesses?

10 MR. EISENBERG: Well, I have a forensic
11 computer expert that we have viewed the Cellebrite
12 download with. I would anticipate calling him as well as
13 Miss Christiansen if, in fact, we are going to go to
14 trial.

15 THE COURT: Okay. Any other unusual
16 evidentiary issues that you think could impact trial in
17 this case?

18 MR. EISENBERG: Well, there -- yes. There is
19 a -- in my motion -- and Miss Dupuich and I also talked
20 about this yesterday, about their forensic expert's
21 report. And that is all dictated in my motion in limine
22 because I have received a report from them which is very
23 sparse. Miss Dupuich yesterday was kind enough to send
24 me a 12-point bullet point of how she's going to walk the
25 agent through the system -- through the testimony. But

1 she hasn't really included yet what he's going to say.
2 And I think that's extremely important for me to know as
3 well, and that is also a part of my motion in limine with
4 a memo that I would file on Friday. So that is an
5 evidentiary issue that might come up.

6 THE COURT: Okay. All right. I will -- I will
7 obviously take a look at the motions in limine when
8 they're filed and rule accordingly.

9 All right. What about your client? Do you think
10 your client would consent to a magistrate judge presiding
11 over jury selection if I decide to do that?

12 MR. EISENBERG: Yes, sir. I don't think that's
13 a problem.

14 THE COURT: All right. Very good. What I may
15 do -- my other trial I've been told is a two-day trial.
16 So what I may do -- I'd be gambling a little bit on
17 this -- is to start this trial on Monday, and even if we
18 go into the fourth day, I could have the magistrate judge
19 pick the jury in my other trial. And then at least if
20 all goes well, I could start that in the afternoon and
21 continue on. But I guess I'll talk with my staff and try
22 to figure out how to time this. But we may keep this on
23 schedule.

24 But given that there may be a motion to continue the
25 trial, I'm going to hold off on actually issuing a trial

1 management -- or a trial order -- a scheduling order
2 until Friday when I can hear from Mr. Eisenberg on
3 whether his client would like to continue this trial.

4 And so don't anticipate getting any order filed
5 until after I hear from you on that issue. Then after
6 that I'll promptly -- if the defendant wishes to go to
7 trial on the 14th, then very promptly after I get notice
8 from you -- in fact, Mr. Eisenberg, why don't you give me
9 notice one way or the other. If he wants to go to trial,
10 just send me an e-mail copying the government on it
11 letting me know that that's what he wants to do. If, on
12 the other hand, he wants to continue the trial, then you
13 can file a motion to continue, and then I'll know from
14 that obviously. And then if I learn that he wants to go
15 to trial, then I will issue a scheduling order very
16 promptly after that.

17 MR. EISENBERG: That's fine. Thank you very
18 much. If -- if, in fact, however, he requests a
19 continuance, do we still file the trial motions by
20 Friday? That deadline's still in effect?

21 THE COURT: No. So if -- if -- if he is
22 wanting to continue the trial, then I would suspend the
23 trial-related motions deadlines and reset those to run
24 from the new trial date. And so, you know, obviously
25 it'd be better if you could get -- if you could get word

1 from him and a position from him before Friday, all the
2 better. But -- but if not, I know the timing here is not
3 ideal. If you can't, you can't. But no, the deadlines
4 will all be moved off to the new trial date.

5 MR. EISENBERG: Thank you so much. I am
6 speaking with him on Thursday, so hopefully I will have a
7 good conversation with him about all this.

8 THE COURT: Okay. Great. And then if
9 possible, if you decide -- if he decides he'd like to
10 continue this trial, if you and the government could
11 consult about a new trial date that you both would
12 request and then let me know that in your motion, then
13 that would be helpful for us to reschedule the new trial
14 date. If you can't consult or you can't agree, then just
15 go ahead and file your motion for a continuance, and then
16 I may get you on the line in a later conference call to
17 try to figure out the timing of it.

18 MR. EISENBERG: Thank you very much.

19 THE COURT: All right. Miss Dupuich, what else
20 should we be talking about today on this case, if
21 anything?

22 MS. DUPUICH: Just the only two primary issues
23 I think are the entrapment and the possibility of the
24 404(b), and that's really it. I think our office's
25 position with respect to COVID is that we're generally

1 not opposing a request to continue given the numbers here
2 in Linn County. So I don't think that would be an issue,
3 and I don't think it would be an issue for us to talk.
4 We certainly have been in communication and would be
5 willing to provide the Court with some proposed new trial
6 dates if that was something that defense wanted. So I
7 don't have anything else.

8 THE COURT: Okay. Great.

9 Mr. Eisenberg, what else, if anything, would be
10 helpful to talk about today?

11 MR. EISENBERG: I think we covered it all,
12 Judge. Thank you so much.

13 THE COURT: All right. Great. Well, thank
14 you, counsel. And have a great Thanksgiving, and we'll
15 be in touch. Thank you. That concludes the hearing.

16 MS. DUPUICH: Thank you.

17 MR. EISENBERG: You too, Judge.

18 THE COURT: Thank you.

19 (The hearing was concluded at 1:14 p.m.)

20 * * * *

21 (This concludes the transcript of the audio recording.)

22 CERTIFICATE

23 I certify that the foregoing is a correct
24 transcript to the best of my ability from the digital
25 record of proceedings in the above-entitled matter.

24	<u>S/Shelly Semmler</u>	<u>9-29-21</u>
25	Shelly Semmler, RDR, CRR	Date

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